ARTICLE 39

How the ECHR Gave Itself the Power to Suspend Expulsions

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The European Court of Human Rights (hereinafter "ECHR" or "Court") has developed a vast body of case law in support of the rights and freedoms of foreigners present in the territory of a State party to the European Convention on Human Rights (hereinafter "European Convention" or "Convention"), or placed under its responsibility, aimed in particular at preventing their expulsion if this might infringe their rights guaranteed under the said Convention. However, the protection afforded to foreign nationals is only effective because the Court has the power to suspend contentious expulsion proceedings. From the ECHR's point of view, it appeared essential to have the power to oblige States to suspend such expulsions, pending its judgment on the merits. The Court can order the State to suspend an expulsion using a procedure known as "provisional measures" or "precautionary measures."

These measures are applied where there is an imminent risk of irreparable harm to a right protected by the European Convention on Human Rights, and where the Court considers them necessary in the interests of the parties or the proper conduct of the proceedings. These measures usually appear in cases involving the expulsion or extradition of foreign nationals[1], but any situation (including inter-state cases) can apply the measures. Although most cases concern threats to the applicants' lives or ill-treatment if their removal occurs, the Court has extended the measures' application to claims relating to the right to a fair trial[2], respect for private and family life[3], or freedom of expression[4]. More recently, in cases like *P.H. and Others v. Italy* and *Camara v. Belgium*, the ECHR applied these measures to require governments to offer accommodations to Roma families[5] and migrants[6].

[1] ECHR, *Soering v. United Kingdom*, no. 14038/88, July 7, 1989.
[2] ECHR, *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09.
[3] ECHR, *Evans v. United Kingdom*, no. 6339/05.
[4] ECHR, *Ano Rid Novaya Gazeta and others v. Russia*, no. 11884/22, decision on interim measures of March 10, 2022.
[5] ECHR, *P.H. and others v. Italy*, no. 27157/19, July 5, 2022.
[6] ECHR, *Camara v. Belgium*, no. 49255/22, Oct. 31, 2022, decision on interim measures. See also ECHR Nov. 15, 2022, no. 48987/22 and 147 others, *Msallem and 147 others v. Belgium*, decision on interim measures; Dec. 13, 2022, no. 52208/22 and 142 others, *Al-Shujaa and others v. Belgium*; no. 55140/22 and 16 others, *Niazai v. Belgium and others*, decisions on interim measures.

Possessing the power to issue binding interim measures guarantees the effectiveness of the Court's jurisdictional authority. This power is essential to prevent expulsions that would risk foreign nationals' rights and freedoms and to guarantee the effectiveness of the ECHR's case law in this area. Indeed, interim measures are the last link in the net of protection for foreign nationals woven by the ECHR. By the principle of subsidiarity, States must apply ECHR case law, which only condemns them if they fail to do so. The Court therefore applies interim measures when it considers, *prima facie*, that the national authorities have probably failed to apply ECHR case law in a particular case. If interim measures were not mandatory and recognized as such, States could expel foreign nationals, even if they were subsequently convicted, which would not affect the actual situation of the foreign nationals.

However, the binding nature of the ECHR's provisional measures is challenged by several governments, as they stand in the way of the policy to combat illegal immigration. Notably, the United Kingdom challenged the binding nature of the ECHR's provisional measures. On April 25, 2024, Parliament passed a law prohibiting national judges from taking account of the ECHR's interim measures against the transfer of illegal immigrants to Rwanda (the "Safety of Rwanda (Asylum and Immigration) Act 2024"). This law is a response to the interim measures issued by the ECHR on June 13, 2022, already opposing such a transfer. France has also made a name for itself by refusing to comply with such interim measures. It was condemned twice in 2018 for expelling foreigners and dual nationals linked to terrorism against the measures indicated by the Court, leading to its condemnation by the ECHR in 2018[7]. More recently, the French Minister of the Interior made it public that he had deported a foreign national to Uzbekistan in defiance of the provisional measures prescribed by the ECHR, telling the press: "What I take responsibility for is not to wait for the decision of the European Court of Human Rights, when the administrative court, the court of appeal and the Council of State have ruled in favor of the State[8]".

Given the significant importance of immigration control issues, clarifying the binding nature of interim measures under the ECHR is timely. Adopting a chronological approach, we trace the origins of this procedure, the refusal of States to give them treaty value, the Court's belated affirmation of the measure's binding force, the ensuing explosion in the number of applications, and finally, the persistence of the measure's contestation.

A procedure introduced by the Court in its Rules of Procedure

In 1949, the European Movement, which launched the idea of a European Convention on Human Rights, proposed inserting a provision on interim measures into a draft statute for the European Court. This provision would have endowed the Court with "the power to indicate, [if it] considers that circumstances so require, the provisional measures which should be taken to preserve the respective rights of one or other of the parties[9]". Although

[7] ECHR, *M.A. v. France*, no. 9373/15, February 1, 2018, concerning an Algerian national linked to terrorism; ECHR, *A.S. v. France*, no. 46240/15, April 19, 2018, concerning a binational Moroccan national linked to terrorism.
[8] "Gérald Darmanin to JDD: ''No taboos to protect the French'", *Journal du dimanche*, October 22, 2023.
[9] Council of Europe, Collection of travaux préparatoires, vol. I, p. 31.

inspired by Article 41 of the Statute of the International Court of Justice, the European Movement did not include the proposed provision in the final text. Thus, the Court does not have any provisions on interim measures.

In the absence of such a power conferred by States in the Convention, the Court itself introduced into its 1959 Rules a provision enabling it to "bring to the attention of the Parties provisional measures the adoption of which appears desirable" (Article 34). The wording was slightly modified in 1982, providing for the possibility of "indicating to any Party and, where appropriate, to the applicant the provisional measures whose adoption by them is recommended[10]". At the time, it was undisputed that these provisional measures were not compulsory, as is also evident from the Article's wording. Provisional measures are recommendations generally respected by the parties in a spirit of loyal cooperation with the Court. States have a *duty* to respect them because of their commitment to the Convention system and not out of obedience to the Court or the former European Commission of Human Rights. States that failed to comply with such requests were not condemned as such, as their non-compliance did not constitute a breach of the European Convention. Ultimately, requests for interim measures were generally accepted, with the Court and the former Commission making little use of this option and only in extreme cases of danger to life or limb.

In 1971, the Consultative Assembly of the Council of Europe wanted to strengthen the Convention system and recommended that member states draft an additional protocol to the Convention. This additional protocol would "confer on the organs of the Convention, and in particular on the European Commission of Human Rights, the power to prescribe interim measures in appropriate cases[11]". The States rejected the additional protocol, claiming that it would be useless[12].

Although abolished in 1998, the former European Commission of Human Rights' role was to receive applications, rule on their admissibility, seek an amicable settlement, and, failing this, refer applicants to the European Court. It was, therefore, directly confronted with urgent situations that might require adopting interim measures.

The Court's recognition of the non-binding nature of its interim measures

In the *Cruz Varas and others v. Sweden* judgment of March 20, 1991 (no. 15576/89), the Court examined the force of interim measures. The case involved an expulsion conducted by the country, despite the former Commission's indication to the contrary. In this judgment, the Court rejected the arguments supporting the binding nature of interim measures, using a strict interpretation of the European Convention. Referring first to the text of the Convention, the Court found that the formulation of interim measures is a "mere procedural norm" provided for by the Regulations and that it "cannot be taken to create a

[10] The English version reads "indicate to any Party and, where appropriate, the applicant, any interim measure which it is advisable for them to adopt".
[11] Consultative Assembly, Recommendation 623 (1971), *Provisional measures complementary to the European Convention on Human Rights*, Yearbook of the Convention, vol. 14, pp. 68-71.
[12] Sessional papers, 25th Ordinary Session (September 25-October 2, 1973), Doc. 3325, pp. 4-6.

legal obligation on the part of a Contracting State" (§ 98), which can only arise from the Convention. The Court went on to reject the argument that the applicant's extradition despite provisional measures to the contrary would constitute a violation of his right to an effective remedy under the ECHR, as "it would distort the meaning of this article [guaranteeing this right] if one were to infer from the words 'undertake not to hinder by any measure the effective exercise of this right' an obligation to comply with an indication [of provisional measures] given under (...) the Rules of Procedure" (§ 99). The Court also rejected the argument that because the States almost always complied with the interim measures was evidence of their binding nature, finding on the contrary that "the practice of complying with the said indications cannot have been based on the belief that they were binding (...); rather, it reflects a concern to cooperate loyally with the Commission when the State in question considers it possible and reasonable to do so." Finally, in response to the argument that the binding nature of provisional measures could be deduced from general principles of international law, the Court clearly stated that "the question of the binding force of provisional measures indicated by international courts is controversial, and there is no uniform legal rule" (§ 101). Thus, the Court concluded that it could not deduce from the Convention a power to order interim measures. Consequently, failure to comply with such measures would not in itself constitute a violation of the Convention but would have the effect of aggravating the respondent State's case if the Court found the measure in question (in this case, expulsion) to constitute a violation of the Convention (§ 103). The respondent State could not claim to have been unaware of the risk of violating the applicant's rights.

The Court also incidentally noted that "it is for the Contracting States to assess the advisability of remedying this situation by adopting a new provision" (§ 102), i.e., by amending the Convention or adopting an additional protocol conferring this power on the Court. This remark was necessary since the Court addressed the States at a time when the institutional reform of the European Convention system was about to begin. When consulted on the draft Protocol 11 reforming the Court's system in 1994, the Court expressed its further disappointment by deploring that the States had not conferred on the Court the power to order provisional measures[13], despite a proposal to this effect from the Swiss government. The States rejected the Swiss proposal so as not to delay the progress of the work[14]. In other words, the proposal was not sufficiently consensual to reach an agreement.

Following the Protocol's abolishment of the former Commission, the Court revised its rules in 1998. The Court adopted Article 39, which states that "the Chamber or, as the case may be, its President may, either at the request of a party or of any other interested person, or of

[13] Opinion of the Court on Draft Protocol No 11 to the European Convention on Human Rights DH-PR (94)4, 31 January 1994, p 3.

[14] See Alphonse Spielmann and Dean Spielmann, "L'indication de mesures provisoires par la Cour unique et permanente - La nécessité d'une réforme", in P. Mahoney, F. Matscher, H. Petzold, L. Wildhaber (eds.), *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal*, Carl Heymanns Verlag KG, Cologne, Berlin, Bonn, Munich, 2000, pp. 1347-1358; and Dean Spielmann, "Les mesures provisoires et les organes de protection prévus par la Convention européenne des droits de l'homme", in *Présence du droit public et des droits de l'homme. Mélanges offerts au Professeur Jacques Velu*, Bruylant, Brussels, 1992, pp. 1294-1317.

its own motion, indicate to the parties any provisional measures which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings". Although the expression "should be adopted" connotes a desire to reinforce the authority of provisional measures, adopting provisional measures remains optional. The judgment in the 2001 case, Čonka *v. Belgium*, confirmed that provisional measures are optional[15].

The spectacular turnaround in 2005: measures now mandatory

The situation changed abruptly in 2005 when the Court pulled off the feat of condemning a government for non-compliance with interim measures for the first time. It did so in the Grand Chamber judgment *Mamatkulov and Askarov v. Turkey* concerning the extradition by Turkey to Uzbekistan of persons accused of terrorism[16]. Unable to condemn a State for non-compliance with a provision of its Rules of Procedure (Article 39), the Court granted binding force to its interim measures indirectly, ruling that non-compliance infringed the rights to an individual and effective remedy guaranteed by Articles 34 and 13 of the Convention, thus contradicting the *Cruz Varas* judgment of 1991. In doing so, the Court drew on a trend among international bodies, particularly the 2001 *LaGrand* decision[17], in which the International Court of Justice (ICJ) affirmed the binding force of interim measures. Several judges contested this spectacular turnaround by the ECHR in a dissenting opinion, noting that the ECHR was not in the same situation as the ICJ since the latter's power to indicate such measures was provided for by the States in its constitutive treaty (Article 41 of the ICJ Statute), unlike the ECHR[18].

Consequently, the ICJ only interpreted a provision of its own treaty rather than creating a new obligation. For these judges, such a conclusion "amounts to an *excess of power*". Even if "such a competence may seem desirable", they point out, as did the *Cruz Varas* judgment, that "it is for the Contracting Parties to confer it on the Court". The Court confirmed this new position in its subsequent judgments[19], holding that non-compliance with interim measures violates Article 34 of the Convention, even if the risk that the measures were intended to prevent did not ultimately materialize[20]. The Court equates the assumption of a risk of violation with the violation itself. Therefore, even if it turns out that the national authorities had conducted a correct assessment of the risks incurred in the event of execution of its decision, non-compliance with the interim measures is in itself sufficient to result in a finding of a violation of Article 34[21].

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[15] *Čonka v. Belgium*, dec. nº 51564/99, May 13, 2001.
[16] *Mamatkulov and Askarov v. Turkey* [GC], no. 46827/99 and 46951/99, February 4, 2005.
[17] LaGrand case; *Germany v. United States of America*, Judgment of June 27, 2001, ICJ Reports 2001, §§ 48 and 117.
[18] Unlike other international treaties and instruments, the ECHR contains no explicit clause on the subject. See, for example, articles 41 of the Statute of the International Court of Justice, 63 of the 1969 American Convention on Human Rights, 185 and 186 of the 1957 Treaty establishing the European Economic Community.
[19] ECHR, *Aoulmi v/ France*, no. 50278/99, Jan. 17, 2006, *§ 112*. See also: ECHR, *Olaechea Cahuas v/ Spain*, no. 24668/03, August 10, 2006, § 63-83.
[20] ECHR, *Olaechea Cahuas v. Spain*, no. 24668/03, August 10, 2006.
[21] Haeck Y, Herrera CB, Zwaak L. Non-compliance with a Provisional Measure Automatically Leads To a Violation of the Right of Individual Application ... or Doesn't It?: Strasbourg Court Takes Away Any

Finally, to declare its provisional measures binding, the Court twisted the law in the name of morality, convinced that its decision was morally right and constituted progress. The fact that it contradicted earlier law was of little consequence, for it was not so much contradicted as superseded in the dialectical movement of human rights progress. By declaring that its provisional measures are binding, the ECHR seeks to reinforce its power and operate by modeling national and federal courts despite being instituted on the model of international bodies founded on loyal cooperation and good faith. In doing so, it has replaced cooperation with obligation.

An explosion in the number of requests for stays of execution of removal orders

One likely consequence of the 2005 ruling was an explosion in requests for provisional measures to stay the execution of removal measures, extraditions, or expulsions of foreign nationals. The President of the European Court in 2011, Jean-Paul Costa, publicly expressed concern at this "alarming increase", noting that between 2006 and 2010, the number of requests for stays of executions had risen by "more than 4,000%[22]", which "threatens to turn it [the Court] into a first-instance immigration court[23]". In 2012, the Court received 1,972 applications[24].

In response to this explosion of requests, the Court took steps in 2011 to reduce the number of requests and manage the requests more effectively by publishing a new "practical instruction" for applicants. The new practical instruction set out the procedure and its conditions and set up an "Article 39 unit" responsible for responding promptly to requests for interim measures. Representatives of the member States heeded President Costa's appeal and, in the declaration adopted at the end of the Izmir High-Level Conference on the future of the European Court of Human Rights on April 26 and 27, 2011, expressed their concerns and their wish to see the number of interim measures reduced. More specifically, the States stressed the need for the Court to "reconcile the practice of interim measures as closely as possible with the principle of subsidiarity", i.e. not to infringe on the role of national courts, "recalling that the Court is not [and should not be] a court of appeal dealing with immigration matters or a court of fourth instance". Even more significantly, the States invited "the Court, on the occasion of applications relating to asylum and immigration, to assess and take full account of the effectiveness of national procedures and, where it appears that such procedures are operating fairly and with respect for human rights, *to avoid intervening except in the most exceptional circumstances*". The States, therefore, call on the Court to exercise restraint in immigration matters. This high-level conference is part of a second reformation process for the European Court, initiated

Remaining Doubts and Broadens Its Pan-European Protection. *European Constitutional Law Review*. 2008;4(1):41-63.

[22] Chairman's statement on Rule 39 requests, no. 127 14.02.2011. https://hudoc.echr.coe.int/eng-press?i=003-5297776-6592690.

[23] Speech by Jean-Paul Costa, President of the European Court of Human Rights, at the opening ceremony of the judicial year, January 28, 2011.

[24] Guillaume Le Floch, Les mesures provisoires devant la Cour européenne des droits de l'homme, Quelques remarques à partir de l'affaire *Lambert, in* Procédure contentieuse, Actes de colloque, online.

at the 2010 Interlaken Conference and aimed at strengthening the Court's system, mainly because of the growing influx of applications.

The persistent refusal to give provisional measures a conventional basis

As part of this process of reforming the Court, the Court envisioned giving the power to indicate provisional measures treaty value by incorporating Article 39 of the Rules either into the Convention or into a new treaty conferring a statute on the Court, like that of the ICJ. Such a statute would contain the rules governing the Court's operation, but the States would adopt it and, therefore, the provisional measures would have conventional value, unlike the Court's rules. However, the representatives of the States rejected this idea, deeming it too complex[25]. Some States took this opportunity to specify the criteria for applying provisional measures. In contrast, others took the opposite view that "any attempt to regulate the Court's ability to exercise this jurisdiction would run counter to the objective of increasing its capacity to react flexibly[26]". In other words, while some States wanted to give the Court a genuine conventional power to order provisional measures, others wanted to seize the opportunity to restrict it further. The result was a failure.

At most, the States agreed to recall, in the Brussels Declaration adopted at the end of the Fourth High-Level Conference on the Reform of the Court in 2015[27], that compliance with interim measures contributes to the fulfillment of the obligations of States Parties under Article 34 of the Convention[28], while reaffirming the "subsidiary nature of the control mechanism established by the Convention and, in particular, the primary role played by national authorities, namely governments, courts and parliaments, and their margin of appreciation in guaranteeing and protecting human rights at national level (...) ". The States also agreed to invite "the Court to consider giving brief reasons for its decisions indicating provisional measures[29]". The Court declined the invitation to justify its decision stating that "to do so would not have been compatible with the need to rule on requests for interim measures within a very short time, generally on the same day as receipt of the request[30]".

Since then, the number of requests for interim measures remains high, reaching 1,936 in 2021 and 3,634 in 2023. According to ECHR statistics, the Court granted 1,419 requests in 2023. The Court no longer complains publicly about the explosion of these requests but is working to manage them. To this end, in October 2022, the Court created a dedicated

[25] See CDDH(2012)R75 Addendum I, paragraphs 32 e) and f) and 33.
[26] Steering Committee for Human Rights (CDDH), Committee of Experts on a simplified procedure for amending certain provisions of the European Convention on Human Rights (DH-PS), Draft final report of the CDDH, 4th meeting, Strasbourg, May 14-16, 2012. DH-PS(2012)R4, Addendum I, p. 37.
[27] High-level conference on the implementation of the European Convention on Human Rights, a shared responsibility. Brussels Declaration March 27, 2015.
[28] The High-Level Conference "Emphasizes the obligations of States Parties under Article 34 of the Convention not to hinder the exercise of the right of individual petition, including by complying with Article 39 of the Rules of Court concerning interim measures, as well as under Article 38 of the Convention to provide the Court with all necessary facilities during the examination of cases".
[29] CDDH, Brussels Declaration, March 26-27, 2015, Action Plan, A 1 d). See also resolution 1788 (2011), aforementioned, § 16.3.
[30] ECHR Annual Report, 2016, p. 13.

website allowing applicants to submit interim measures requests to the European Court electronically.

The persistent challenge to the binding nature of interim measures

The binding force of interim measures remains contested. The ECHR deplored this situation in the words of its President[31], pointing out that "in 2023, certain States continued to assert that they doubted whether they were bound by interim measures" and found it "very worrying that certain Contracting States are prepared to disregard their international obligations in this way[32]". This doubt about being bound by interim measures is notably the case for Russia, but also the United Kingdom (UK) and France, as mentioned in the introduction.

In the case of France, the administrative judge confirmed the binding force of its interim measures. In 2008, the administrative judge decided to annul an expulsion decision that violated a provisional measure indicated by the ECHR[33]. The *Conseil d'État* also ruled that failure to comply with a provisional measure constituted a serious and manifestly unlawful infringement of the right of individual petition guaranteed by Article 34 of the European Convention on Human Rights[34]. However, this did not prevent the government from deporting foreigners and dual nationals linked to terrorism against the measures indicated by the Court, provoking its condemnation by the ECHR in 2018[35]. More recently, the Conseil d'État condemned the government for expelling a foreign national to Uzbekistan in disregard of the interim measures prescribed by the ECHR, seeing this as a "serious and manifestly illegal infringement of a fundamental freedom" and ordering the Ministry of the Interior "to take all necessary measures as soon as possible to enable the return, at the State's expense, of Mr. A. to France[36]". Criticized for this decision, the Minister then declared, as already stated in the introduction: "What I assume is not to wait for the decision of the European Court of Human Rights, when the Administrative Court, the Court of Appeal and the Council of State have ruled in favor of the State[37]".

At another international body, France also denied any binding nature to the interim measures issued on May 3, 2019, by the United Nations International Committee on the Rights of Persons with Disabilities (CRPD), enjoining the French government to maintain the care provided to Vincent Lambert (*Lambert v. France* case). This refusal is even more striking given that the possibility of prescribing such provisional measures was provided

[31] See the statements made by the President of the ECHR in the 2022 and 2023 annual reports.
[32] Síofra O'Leary, President of the ECHR, Annual Report 2023, p. 7.
[33] TA Paris, Apr. 17, 2008, no. 0800755, *Subramaniam Rajathurai c/ Préfet de police*: JurisData no. 2008-002934; AJDA 2008, p. 1445, concl. P. Letourneur.
[34] CE, ord. June 30, 2009, n° 328879, *Ministre de l'Intérieur c/ Beghal*: JurisData n° 2009-004779; Rec. CE 2009, p. 240; JCP G 2009, act. 139, obs. M.-C. Rouault. The Conseil d'Etat nevertheless suggests that the administrative judge may not comply with the interim measures indicated by the ECHR in the event of "*an overriding requirement of public policy*" "*or any other objective obstacle*". Cf. Le Floch.
[35] ECHR, *M.A. v. France*, no. 9373/15, February 1, 2018, concerning an Algerian national linked to terrorism; ECHR, *A.S. v. France*, no. 46240/15, April 19, 2018, concerning a binational Moroccan national linked to terrorism.
[36] Conseil d'État, Juge des référés, 07/12/2023, no. 489817.
[37] "Gérald Darmanin to JDD: ''No taboos to protect the French'", *Journal du dimanche*, October 22, 2023.

for by States in the Optional Protocol to the Convention on the Rights of Persons with Disabilities. When Vincent Lambert's parents brought the case, the Paris Court of Appeal refuted the French State's arguments and ordered the State to "take all measures to ensure compliance with the provisional measures requested by the International Committee on the Rights of Persons with Disabilities on May 3, 2019, to maintain the feeding and hydration" of Vincent Lambert[38]. The Court of Cassation, seized by the State, overturned the decision of the Court of Appeal but avoided ruling on the force of the provisional measures[39]. Seized in turn by the Lambert parents, the ECHR surprisingly found no fault with France's refusal to comply with the interim measures issued by the UN CRPD. The Court rejected the new request from Vincent Lambert's parents, thus confirming France's failure to comply with the interim measures issued by this Committee[40].

In the case of the United Kingdom, its current government is contesting the binding force of interim measures after British courts prevented the transfer of illegal aliens to Rwanda because the ECHR requested interim measures on June 13, 2022. The British courts required the government to comply with the interim measures issued by the ECHR.

A bilateral agreement between the UK and Rwanda governs the transfer. The agreement sets out the terms and conditions for relocating illegal immigrants to process their applications for residence permits in the host country at UK expense. Anyone granted asylum would continue to reside in Rwanda, while rejected asylum seekers would be returned to their country of origin. The agreement intends to function as a deterrent to migrants.

The ECHR decision caused a stir in the UK and renewed tensions between the British government and the European Court. The measures were publicly challenged. The public criticized the Court for imposing these measures without respecting basic court procedures since a single, unidentified judge adopted the interim measures and sent them by a simple, unsigned letter without giving any reasons or allowing any adversarial debate. Also, the Court failed to publish these decisions, resulting in more criticism[41]. Although these criticisms of the ECHR's shortcomings in reaching these decisions are particularly strong in the UK, they are of general application and are shared elsewhere in Europe[42].

Faced with such criticism, in 2024, the ECHR sought to respond by publishing in 2024 a revised version of Article 39 of its rules of procedure and the practical instruction on provisional measures. The new version of Article 39 changes nothing in practice but

[38] CA Paris, Pôle 1er, 3rd ch., May 20, 2019, n° 19/08858.
[39] Cour de cassation, Ruling no. 647 of June 28, 2019 (19-17.330; 19-17.342).
[40] On April 29, 2019, the ECHR rejected the request for interim measures submitted by Vincent Lambert's parents.
[41] See in particular Richard Ekins KC (Hon), *Rule 39 and the Rule of Law*, Policy Exchange, London, 2023, with a preface by Lord Hoffmann and an afterword by Lord Sumption. See also Thibaut Larrouturou, "Plaidoyer pour la motivation des mesures provisoires adoptées par la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'Homme*, 2023/2 (No. 134), pp. 343-364.
[42] See e.g. Saccucci, A. (2021). Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges. In: Palombino, F.M., Virzo, R., Zarra, G. (eds) *Provisional Measures Issued by International Courts and Tribunals*. T.M.C. Asser Press, The Hague; Dzehtsiarou, K., & Tzevelekos, V. P. (2021). Interim Measures: Are Some Opportunities Worth Missing? *European Convention on Human Rights Law Review, 2*(1), 1-10.

clarifies and codifies the use of provisional measures. In particular, Article 39 states that interim measures may be applied where there is an "imminent risk of irreparable damage to a right protected by the Convention". The Court also decided that interim measures would now take the form of formal judicial decisions addressed to the parties, with the identity of the judge or judges adopting the decision. However, the Court refused to give reasons for and publish all decisions granting interim measures, reserving the right to do so on a case-by-case basis. Therefore, conducting an in-depth analysis of the ECHR's action in this field is impossible, which is regrettable given its importance and the need for transparency in public action. As for the practical instructions, they have been primarily completed and clarified. The President of the Court publishes the only document that explicitly states that provisional measures are mandatory. Finally, while partially responding to British criticism, the Court has strengthened the authority of its interim measures by giving them the form of judicial decisions rather than mere procedural measures.

The current conclusion to this story once again takes place in the UK, where on April 25, 2024, Parliament passed a new law entitled the "Safety of Rwanda (Asylum and Immigration) Act 2024", which asserts that Rwanda is a safe country to receive illegal immigrants present in the UK. The Act aims to reduce illegal immigration through the threat of "relocation" to Rwanda. The Act restricts the ability of individuals to appeal against such relocation, as well as the ability of British judges to prevent it. Concerning the ECHR's interim measures, the Act expressly prohibits national judges from taking them into account, stating that the government should decide whether to comply with them since interim measures are addressed to governments. Filippo Grandi, United Nations High Commissioner for Refugees, and Volker Türk, United Nations High Commissioner for Human Rights, reacted to the adoption of the Act, expressing "deep concern that the Act would allow for the transfer of asylum seekers under the UK-Rwanda partnership, with very little consideration of the individual situation of those concerned or the protection risks". They also considered that "this situation is all the more worrying given that the new Act expressly authorizes the Government to disregard interim protection measures taken by the European Court of Human Rights[43]".

Other European governments are considering, or have already entered into, similar agreements to relocate illegal immigrants to safe destinations. The agreement between Italy and Albania is evidence of the new efforts to relocate illegal immigrants.

In conclusion

The adoption of provisional measures is a classic procedure within national jurisdictions. Within an international jurisdiction, however, provisional measures can only be binding if the States subject to that jurisdiction have accepted them in accordance with the general rules of public international law. Thus, the ECHR was only able to assert its binding force indirectly via Article 34 of the Convention, boldly assuming that States had implicitly

[43] Statement by Filippo Grandi, United Nations High Commissioner for Refugees, and Volker Türk, United Nations High Commissioner for Human Rights, "*UK law to deport asylum seekers to Rwanda: UN leaders warn of harmful consequences*", April 23, 2024.

consented to them, even though it had previously declared the contrary, and the lack of consensus between States on this issue had become apparent during the drafting of Protocol 11. In other words, the Court presented States with a *fait accompli*, confident that most governments and academics favored strengthening its power; opponents remained isolated. By declaring its provisional measures binding, the ECHR sought to reinforce its power on the model of national courts, where it had hitherto operated on the model of international bodies based on loyal cooperation and good faith. In doing so, the Court replaced cooperation with obligation.

The unprecedented explosion in illegal immigration complicated the implementation of this decision, leading to a considerable and unforeseen increase in the number of requests for interim measures to suspend the expulsion of foreign nationals. A body of case law supports these requests and is particularly protective of the rights of foreign nationals. The body of case law applies as soon as foreign nationals find themselves on the territory or under the responsibility of a Member State. This body of case law affected the very function of the ECHR, which has become a kind of court of last resort for thousands of foreign nationals awaiting deportation. Numerous applications overwhelmed the Court, and often those applications were poorly drafted, contained documents written in non-European languages, and were based on allegations often unverifiable by the Court. In the end, the result was that the mere fact of requesting and obtaining provisional measures could be enough to remove the foreign national in question from the surveillance of the authorities and his or her expulsion.

The European Convention and Court were not designed to cope with a wave of migration. The result is a growing gap between the logic of governments and that of the Court. Where some governments see a problem of massive illegal immigration jeopardizing the future of civilization, the European Court sees a quantitative problem of applications jeopardizing the rights of individuals. The European Court wants to protect individuals, whereas governments want to protect society by containing immigration. The Court bases itself on moral principles, while governments respond to political necessity. Only the reconciliation of these two logics can be worthy of Europe, i.e., being faithful to its principles without jeopardizing the survival of its culture. Moreover, experience shows that the Court comes up against political opposition when it tries to impose its principles against political necessity. Also, politicians face moral disapproval if they respond to the necessities caused by mass immigration in complete ignorance of principles. However, a society can only exist and survive if it ensures the preeminence of its common good over the rights of outsiders.

For the ECHR to impose an obligation on States to respect its interim measures is not only a departure from the classic rules of public international law but also runs counter to the necessary conciliation between principles and necessities. This lack of conciliation sometimes leads to the irresponsible use of interim measures and ultimately motivates the challenge to their binding force.

No one can dispute the Court's ability and usefulness in recommending the adoption of interim measures but not in imposing them, as this power has never been conferred upon the Court. Even when provisional measures are declared mandatory, they are not binding since the ECHR cannot impose compliance on States; it can only note its non-compliance

and condemn the breach. To impose itself on national governments, the European Court must circumvent the government's possible refusal by relying on the swift intervention of the national courts.

Finally, the dispute over provisional measures calls into question not only the Court's tendency to increase its power at the expense of States but also its refusal in principle to distinguish between foreigners and nationals when guaranteeing rights and, even more so, its individualistic framework of thought, which gives priority to the rights of any individual, even a foreign and dangerous one, over the interests of society. Conversely, the migration crisis is leading governments to call for the use of their sovereignty to control immigration, to distinguish between nationals and foreigners, and to rediscover the necessary primacy of the common good over individual rights.

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